

Issues: Group II Written Notice (excessive tardiness), and Termination due to accumulation; Hearing Date: 03/15/17; Decision Issued: 03/16/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10953; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10953**

Hearing Date: March 15, 2017

Decision Issued: March 16, 2017

### **PROCEDURAL HISTORY**

On December 12, 2016, Grievant was issued a Group II Written Notice of disciplinary action with removal for excessive tardiness.

On December 27, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 30, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 15, 2017, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Safety and Security Technician at one of its facilities. She had prior active disciplinary action. Grievant received a Group II Written Notice on March 12, 2014 for unsatisfactory attendance/excessive tardiness. She received Group I Written Notice on December 12, 2016 for unsatisfactory attendance.

The Facility used a time clock system where employees would "swipe" to show when they arrived at work and departed from work.

Grievant was expected to report to work at 6 a.m. on the days she was scheduled to work. If she arrived between three and 60 minutes late, she was considered to be tardy. If she reported to work later than 60 minutes she would receive an "occurrence."

Grievant reported to work late on October 30, 2016, November 8, 2016, November 10, 2016, November 14, 2016, and November 21, 2016.

The Facility's pay periods included the periods from October 25, 2016 to November 9, 2016 and from November 10, 2016 to November 24, 2016.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Policy JI 8-2 governs Tardiness. “Tardy” is defined as, “[l]ate arrivals of 3 to 60 minutes would be constitute a ‘tardy’”. “Unacceptable Tardiness” is:

Five tardies in a two-pay period timeframe is unacceptable. Four tardies or less in a two-pay period timeframe will not result in any corrective action.

Tardiness is a Group I offense.<sup>2</sup> Grievant was tardy five times during two pay periods. The Agency has presented sufficient evidence to support the issuance of a Group I offense.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant has a prior written notice for excessive tardiness. Accordingly, the Agency may elevate the Group I Written Notice to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency’s decision to remove her from employment.

Grievant argued that she asked the Supervisor for an alternate schedule to accommodate her tardiness. The Supervisor testified she offered Grievant several alternate schedules to address occurrences but not tardiness. Grievant offered no evidence to contradict the Supervisor’s testimony.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management ....”<sup>3</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> Va. Code § 2.2-3005.

the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal based on the accumulation of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>4</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.